NO. 10-275

In The

Supreme Court Of The United States

Tonia E. Fisher

vs.

Southwestern Bell Telephone Company

Petition for a Writ of Certiorari

to the United States Court of Appeals

for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The arguments submitted in response to the petition for certiorari are untenable. First, the response proposes that the questions presented have been waived. It is alleged that petitioner asserted *for the first time* in her brief on appeal the mixed motives analysis. This reply will show that the questions presented for review are indeed properly before this Court.

Second, the response does not deny that there is a wide circuit split over what the proper standard to evaluate claims at the summary judgment stage is. Instead, the response strategically states there is no circuit split on so called 'single motive' cases, and then proceeds to label petitioner's case as such. The questions, as presented by petitioner, are reformulated by the respondent to divert attention from what are well known and documented dissentions within the Federal Courts of Appeals.

In an effort to diminish the importance of this continuing circuit split in relation to Title VII, the approach of the response is to differentiate a so called 'single motive' from 'mixed motives'. Simply put, this cannot be reconciled with the plain language of the governing statute[1].

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[1] 42USC2000e-2(a) It *shall* be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because

The response contends petitioner's case was a so called 'single motive' and that the McDonnell Douglas pretext analysis[2] was correctly utilized at the summary judgment stage to dismiss petitioner's claims. The question presented, as it relates to Title VII, and as articulated by petitioner--- is whether the mixed motives analysis is the correct legal standard at the summary judgment stage.

If an incorrect legal standard is used to evaluate the evidence, *as a matter of law*, the evidentiary determinations under that standard are flawed.

The question here is whether the petition should be granted. Whether there even exists a so called 'single motive' under Title VII, as amended, and the viability of the pretext analysis to demonstrate *a motivating factor* are encompassed within the questions petitioner presented to this Court. By arguing in support of the so called 'single motive'

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of such individual's race, color, religion, sex, or national origin. 42USC2000-2(m) Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for *any* employment practice, even though other factors also motivated the practice.*****sec.2000e-2(a) is defining what an unlawful employment practice is. 2000e-2(m) is stating when that definition is established. The verbiage 'except as otherwise provided in this subchapter' is referring to disparate impact. 'Even though other factors also motivated the practice' is Congress' acknowledgment that employers will ***always*** allege a non-discriminatory reason for their action..

[2] The pretext analysis originated in *1973----before the 1991 amendments to Title VII*----as a framework for evaluating disparate treatment claims

pretext analysis, the response inadvertently reinforces the significance of the petitioner's questions presented.

Finally, the response argues that under either framework ----McDonnell Douglas or mixed motives----the decision below was correct. A review by this Court would not support that proposition. There is a substantial difference in the two analyses.

II. REASONS FOR GRANTING CERTIORARI

A. *The questions presented are properly before this Court.*

The Respondent alleges that the questions presented are not properly before this court, and that the mixed motives analysis was raised *for the first time* on appeal. Neither contention is correct. As the record reveals[3], the mixed motives analysis was raised initially in the District Court[4],[5].

The lower Court's passing on the issue in no way deprives this Court of jurisdiction to review the questions presented. As this Court has stated: "not

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[3] Supreme Court Rule 12(7): In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court.

[4] See Doc.#313, Case 4:07-cv-00433-CVE-FHM, USDC ND/OK.
[5] See Instone Travel Tech Marine & Offshore v. Int'l Shipping Partners, 334F.3d 423, n.7; 5th Circuit; 2003 (stating issue raised for the first time in post judgment motions are preserved for appeal.), New York Life Insurance Co. v. Brown, 84F.3d 137, n.4; 5th Circuit, 1996 (same).

only may the Court address an issue that was passed on below, even if it was not pressed, but that there is a particular reason to do so when the issue is 'one of importance to the administration of Federal law'.".[6]

Further, even if the mixed motives analysis was not raised below -----which, as the record confirms, it was----- it is still properly before this Court. 'The traditional rule is that once a Federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments below.'[7].

Moreover, so called 'single motive' and 'mixed motives' are not claims, rather they are theories and/or arguments as they relate to the actual claims; violations of Title VII and the ADA. Accordingly, the questions presented are both preserved and appropriately before this Court.

B. ***The response in opposition only reinforces the need for this Court's review.***

The response attempts to dissuade this Court from granting the petition by alleging that 'petitioner always asserted a single-motive/pretext claim.'. There was never any stipulation agreed to concerning a so called 'single-motive' theory.

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[6] See Bankshares v. Sandberg 501 US 1083, n.8 ;1991 ("Respondents argue that this issue was not raised below....it suffices.....that the Court below passed on the issue".).

[7] See Yee v. Escondido, 503 US 519, 1992

Theories such as 'single motive' and 'mixed motives' are usually addressed by the Court and clarified at the pre-trial conference. In petitioner's case, summary judgment was granted just three days prior to the only pre-trial conference for the case. *Further,* petitioner's complaint[8] stated claims under Title *VII, as amended.* Notably, the 1991 amendments clarified the standard of causation to be *'a motivating factor'.*

In Price Waterhouse v. Hopkins, 490 US 228, 1989, the concept of mixed motives was first introduced. The plurality recognized that "to construe the words *'because of'* as colloquial shorthand for *'but-for causation',* as does Price Waterhouse, is to *misunderstand* them. This Court pointed out that "Congress specifically rejected an amendment that would have placed the word 'solely' in front of the words 'because of' "[9].

At oral argument in Desert Palace v. Costa, 539 US 90, 2003, there was much discussion concerning a so called 'single motive' and mixed motives[10]. As implicitly recognized during oral argument, once an employer alleges a non-discriminatory reason for the negative employment action, every case at that point in time becomes a mixed motives case. The Ninth Circuit En Banc decision in Costa v. Desert

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[8] See 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc#136, filed 28Oct2008.

[9] Price Waterhouse v. Hopkins, 490 US 228, 1989, fn#7- referring to 110 Cong. Rec. 2728, 13837(1964).

[10] See transcript oral argument: Desert Palace, 539 US 90, 2003.

Palace, 299 F.838, 2003,·····which this Court *unanimously* affirmed·····recognized that so called 'single motive' and mixed motives are not two fundamentally different categories of cases.

Before Desert Palace a case was labeled according to the type of evidence presented. For cases presenting circumstantial evidence only, the Court's utilized the McDonnell Douglas/pretext analysis. The mixed motives analysis was limited to cases where direct evidence was presented.

Desert Palace held direct evidence was not necessary for a mixed motives instruction. The Court determined the plain language of the statute did not support a heightened evidentiary requirement. The same reasonable jury standard is required at summary judgment as is at trial. It would be absurd to demand a higher burden on the plaintiff at the summary judgment stage than what would be required at trial.

The holding in Desert Palace has effectively removed any distinction between labeling a case as 'single motive' or mixed motives. As evidenced by the response, however, this erroneous dichotomy is continuing even after Desert Palace. Countless individuals who are discriminated and/or retaliated against in the workplace are being denied their statutory rights.

Further, although the District Court did utilize the McDonnell Douglas framework [11] at summary judgment····· petitioner then disputed there were no genuine issues of material fact concerning pretext [12], and also asserted that under a mixed motive analysis there were genuine issues of material fact on all of the claims.

The response asserts that petitioner seeks review of 'whether, in light of this Court's decision in Desert Palace, Inc. v. Costa, 539U.S. 90(2003), a "mixed motives" analysis should have applied to petitioner's Title Vll and ADA claims.'.

The question presented for review in relation to Title Vll, as articulated by petitioner, asks whether "Under the plain language and ordinary meaning of Title Vll, *and after this Courts holding in Desert Palace*, the appropriate legal standard for analyzing claims brought under title Vll at the summary judgment stage is the mixed motives analysis.

This distinction is important because the plain language of the statute, after the 1991 amendments, specifically uses the terminology 'a motivating factor' as the standard of causation. Nothing within the governing statute supports the sole use of a pretext analysis. Petitioner's claims were erroneously dismissed at the summary judgment stage under a

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[11] Doc.#296, Case 4:07-cv-CVE_FHM

[12] Petitioner expressly states there are genuine issues of material fact as to pretext. The standard of causation under Title Vll, as amended, is 'a motivating factor'. A motivating factor may be demonstrated by, *but is not limited to*, pretext.

legal standard that cannot be justified after the 1991 amendments.

Additionally, the suggestion of the response that this Court continues to sanction the use of the pretext analysis under Title VII[13] is unavailing. Neither case cited questioned the propriety of that standard. Therefore, the cases cited as support for that proposition are of no consequence.

The question of so called 'single motive' theory, 'mixed motives' theory is instrumental to the questions presented[14] and ripe for this Court's determination. As amply illustrated by the response, employers are using the pretext analysis at the summary judgment stage to in an attempt to circumvent the statute(s). In a civilized society, when a statute is violated-----certainly one that affects an individual's very livelihood----- a sham to evade liability cannot trump the legislation enacted to provide for such.

C. *The lower Court erred in granting summary judgment.*

The response alleges that there is *no evidence whatsoever* that discrimination and/or retaliation formed any part of the motive for petitioner's

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[13] Response, p.9; citing to Raytheon Co. v. Hernandez, 540 US 44, 53-55, 2003, Johnson v. California, 545 US 162, 171 n. 7, 2005.

[14] Supreme Court Rule 14(1)(a): The statement of any question presented is deemed to comprise every subsidiary question fairly included therein.

termination. A separate appendix was filed with the response purporting to be petitioner's opposition to summary judgment[15][16]. However, the document submitted---A1-A36---is not an actual and complete duplicate of petitioner's response in opposition.

Although respondent's appendix does not show the document # or date filed, the actual record reflects the document to be #255, filed on 09Mar2009. Omitted from the appendix are fourteen exhibits attached to petitioner's opposition[17], and part of the true record filed. Additionally, doc. #260; 1-8, with eight exhibits, doc. #261, #262, are all part of the addenda to petitioner's opposition to summary judgment[18].

The alleged non discriminatory reason for petitioner's termination, insubordination for refusing to attend a safety course, defies sound reasoning and logic. Respondent's own documentation on petitioner's performance evaluations, *before* the first internal EEO complaint, describes petitioner as "*safety conscientious*" and "*makes good safety sense*". Likewise, it is a nonsensical proposition to maintain that climbing with gaffs was an essential function of petitioner's job or one of her basic job duties. The record reveals petitioner performed her job satisfactory for over

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[15] See A1-A36

[16] The typographical errors not indicative of the true record are assumed to be a result of the reformatting.

[17] Case 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc#255:1-14 filed on 09Mar2009.

[18] Case 4:07-cv-00433-CVE-FHM, USDC ND/OK doc#260; filed on 10Mar2009, doc#261,#262, filed on 11Mar2009.

nine years without one time utilizing what respondent's term as an essential function[19], even exceeding expectations----again, *before* the EEO complaint. It is more than reasonable to ask what is wrong with this picture.

Although the response states that it is undisputed that similarly situated males were required to attend the training(response p.6), the record reveals otherwise[20] [21].

The Court below affirmed summary judgment under an erroneous legal standard. The response concedes as much while contemporaneously claiming the decision below was correct. The McDonnell Douglas framework, as described by respondents, requires a plaintiff to prove 'but for' causation(see response p.9). Nonetheless, the response states that "to avoid summary judgment, the record evidence would have had to allow a reasonable jury to find by a preponderance of the evidence that gender discrimination or retaliation were ***'a motivating factor'*** in SWBT's termination decision."(see response p. 15). Put simply, the McDonnell Douglas

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[19] The response submits that an essential job function is the ability to climb non step telephone poles using hooks. The written job description states 'climbs step and nonstop poles to a working height of a min. of 18 feet ***and/or*** climbs ladders and works aloft with hand tools'. See Doc#228-1, P. 11, case 4:07-cv-00433-CVE-FHM, USDC ND/OK.

[20] See response A-21 #15, also, case 4:07-cv-00433-CVE-FHM, USDC ND/OK, doc. #260, exhibit 8.

[21] See case 4:07-cv-00433-CVE-FHM, doc#260, exhibit 5, filed 10Mar2009.

framework limits it's analysis solely to pretext[22]. This is far from the standard of causation the statute mandates: *a motivating factor.* This is a difference that makes a difference.

For example, under the pretext analysis a plaintiff is limited to disproving that the employers alleged reason is the true reason for the negative employment action. Even if the Court accepts the alleged non-discriminatory reason as true, the pretext analysis does not address whether there were other prohibited factors, ie: a protected characteristic, that also motivated the action.

It's been almost twenty years since Congress amended Title VII after finding that 'additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace', and 'legislation is necessary to provide additional protections against unlawful discrimination in employment'[23]. Over seven years ago this Court held in Desert Palace that no heightened evidentiary requirement was required under Title VII.

Still, the lower Courts are confused and continuing to apply an erroneous legal standard at the summary judgment stage under Title VII. As authorized by the United States Constitution, and in the interest of the fair and efficient administration of justice, this institution is in a position to bring about resolution. The sooner, the better.

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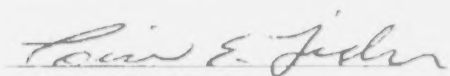
[22] See response p. 6-7 #3, appendix for petitioner, 9a-10a.
[23] Civil Rights Act of 1991, section 2(1)(3).

The United States Supreme Court continues to shine as a beacon of hope, to even the least among us, that individuals have a right to be heard. This case presents an outstanding opportunity for this Court to resolve important questions of Federal law, while ensuring equal justice under law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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